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92-1387

No. _____

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

NANCY MCNUTT, PETITIONER

v.

GTE FLORIDA, INC., RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SECOND DISTRICT COURT

OF APPEAL

PETITION FOR WRIT OF CERTIORARI

Nancy McNutt, Pro Se
3030 Courtland St.
Sarasota, Fl 34237
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4 cy

QUESTION PRESENTED FOR REVIEW

1. The Second District Court of Appeal and the Circuit Court of the Twelfth Judicial Circuit of Florida ignored perjured sworn statements by Respondent GTE Florida Inc. that had the effect of denying Fourteenth Amendment guarantees concerning vested property rights (pension) and due process. The Circuit Court and the Second District Court of Appeal also accepted, contrary to federal law, common law and the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, the affidavit of petitioner's arbitrator, submitted in support of GTE Florida, after the arbitration hearings were closed. The question thus presented, as it concerns the above issues, is: Whether Florida Courts can usurp federal law, common law, and the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes?

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NANCY MCNUTT, Petitioner,

v.

GTE FLORIDA, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SECOND DISTRICT COURT

OF APPEAL

Nancy McNutt, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgement of the Second District Court of Appeal, entered in the above-entitled case on 21 October, 1992.

OPINIONS BELOW

The October 21, 1992 opinion of the Second District Court of Appeal, whose judgement is herein sought to be reviewed is unpublished (case number 92-2009) and is

reprinted in the separate Appendix to this Petition. The prior opinion of the Circuit Court of the Twelfth Judicial Circuit is unpublished (case number 91-4513-CA-01), and is reprinted in the separate Appendix to this Petition.

STATEMENT OF JURISDICTION

The judgement of the Second District Court of Appeal was entered on 21 October 1992. The jurisdiction of this Court is invoked pursuant to 28 USC 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Post Hearing Conduct, D. Clarification or Interpretation of Awards, 1. "No clarification or interpretation of an award is permissible without the consent of both parties."

STATEMENT

On March 6, 1992, respondent GTE Florida, Inc., was the prevailing party in an action to vacate an arbitrator's award (case number 92-4513). On March 10, 1992 petitioner, Nancy McNutt, filing pro se, filed two motions for relief from judgement - fraud and surprise. The motions were scheduled for determination by the trial judge on April 27, 1992 at 2:30 P.M.

On April 6, 1992, petitioner filed a full appeal on the last day possible to do so (case number 92-1328). On April 9, 1992 respondent GTE Florida sent a letter to the trial judge claiming petitioner's motions for relief from judgement were "abandoned". Subsequently, on April 13, 1992 the trial judge denied petitioner's motions as moot and on April 14, 1992 sent notice that the scheduled hearing on April 27, 1992 was cancelled. Please see Appendix B.

On April 21, 1992 petitioner filed a petition for writ of mandamus, case number 92-1457. This was done in order to secure a due process hearing concerning denial of full seniority and pension rights negotiated through collective bargaining. On April 24, 1992 petitioner's mandamus request was consolidated by the Second District Court of Appeal with petitioner's full appeal (case number 92-1328). The same district court order also changed petitioner's mandamus petition to a motion to relinquish jurisdiction, stating

that,"jurisdiction is relinquished to the circuit court for 45 days for petitioner to obtain a ruling on her motions for relief from judgement." Please see Appendix B. Judge Andrew Owens on April 29, 1992 issued a second order, again, without a hearing and, again denying petitioner's motions for relief from judgement. Please see Appendix B.

On May 20, 1992 petitioner filed for a writ of mandamus in the Florida Supreme Court to compel that a three judge panel be assigned, as required in mandamus proceedings, and that procedural fairness be applied (case number 79,893). Petitioner's mandamus request was denied July 16, 1992.

On May 29, 1992 petitioner filed an appeal from a non-final order (case number 92-2009), and on June 15, 1992 petitioner voluntarily dismissed her full appeal, believing that the Second District Court of Appeal would once again consolidate cases, which they did. On June 15, 1992 the Second District Court of Appeal re-activated mandamus case number

92-1457. This case is currently active without a ruling.

On October 21, 1992 the Second District Court of Appeal affirmed the lower court on petitioner's appeal from a non-final order. The first line of the order reads, "Not final until time expires to file rehearing motion and if filed determined."

On October 23, 1992 petitioner filed a motion for recall of mandate. This motion included, as exhibits, the affidavit of Arbitrator William Gary Vause in support of respondent GTE Florida, and an exhibit that showed how the Second District Court of Appeal had consolidated, without issuing an order, petitioner's full appeal with her appeal from a non-final order.

On November 9, 1992 the Second District Court of Appeal, on its own motion, changed petitioner's motion for recall of mandate to a motion for rehearing and denied same. Please see Appendix C. On November 16, 1992 petitioner

filed a petition to invoke all writs jurisdiction in the Florida Supreme Court. This was done in order to secure due process in the District Court, and a new appellate review, if possible, by a neutral and unbiased court.

The federal issues of seniority/pension rights and the arbitrator's submission of an affidavit on behalf of respondent, GTE Florida, were both raised February 5, 1992 during the circuit court hearing. Quoting from page 39 of the hearing transcript, "Your Honor, I'd like to make a point here. Mr. Albeck (GTE Florida's attorney) had sent some material to you and excluded an affidavit that William Gary Vause (the arbitrator) submitted on behalf of GTE." Quoting from transcript pages 40 and 41 - "MR. ALBECK: Let me state for the record, Your Honor, when this case was being scheduled for hearing today, your secretary suggested I send you copies of the entire proceedings as they have transpired. And I

sent you copies of the petitions for disqualification, the petition that takes it out of the circuit, and a copy of my memorandum of law, and affidavits of the various parties attached to that memorandum. So I sent the complete package to Your Honor. MS. MCNUTT: Your Honor, I maintain it was incomplete... THE COURT: Well, I have the affidavit of W. Gary Vause that he signed September, 12th day of September, 1991. Now, whether your packet had omitted it or not, I don't know. It was filed with the Court September the 18th." The The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes was also proffered and accepted by the circuit court judge at this hearing. Quoting from pages 98 and 99 of the hearing transcript, "THE COURT: I really don't think it's that relevant (the Code). If you feel, as far as a hearing before a judge, I'm very liberal in allowing you to put anything in that you want, I'm not saying I'll receive it or review it, but if you feel that it's important for

your -- if it ends up that you end up taking an appeal, either side, if you feel it's important and it's something that would have to be reviewed, if you had to take an appeal in order to receive a fair appeal, I don't mind you proffering it and putting it in. I would have to agree with Mr. Albeck that I Don't think it's relevant to the issues that were presented here, but I'll let you choose to do it in any way you like."

On the issue of seniority/pension rights - quoting from hearing transcript page 49, "Ron Johnson, who is GTE Florida's State Manager of Labor Relations affidavit is in error. I was never hired as a temporary employee in 1967. GTE Florida had no temporary employees in 1967 in the Sarasota business office where I worked. I did not resign September 20, 1969, but transferred to GTE offices in Tampa in order to work while attending school..." Paragraph two of Mr. Johnson's affidavit states - "Plaintiff was originally hired on

September 18, 1967, as a temporary Traffic Operator and resigned on September 20, 1969. She was again rehired as a temporary Traffic Operator on December 1, 1969, and again resigned on September 1, 1973. On June 19, 1974, she was hired as a full-time Operator. On November 19, 1978, she was promoted to a Service Representative, and remained in that position until she was terminated on July 10, 1989."

The denial of full seniority/pension benefits by respondent GTE Florida, Inc. was the subject of petitioner's motion for relief from judgement (fraud) filed March 10, 1992 in Sarasota Circuit Court. Quoting paragraphs 4, 13, 14 and 15 from the motion - "That the grievance against GTE Florida prepared by attorney, Bruce Fein (petitioner's attorney for the arbitration) also stated correct dates of employment service, and that Judge Owens admitted this into the record. That GTE Florida intentionally distorted my correct accredited service date in sworn

statements presented to the court, and in sworn testimony during the arbitration hearing. That GTE deliberately deprived plaintiff of over five years in accrued pension benefits. That this act was retaliatory, in part due to, plaintiff's letters to the Florida Public Service Commission, and a meeting May 1, 1989 with a PSC auditor."

On the appellate level seniority/ pension issues were raised in a petition for writ of mandamus filed April 21, 1992 (rehearing denied May 12, 1992 by the circuit court - please see Appendix B). "That by not allowing the petitioner the opportunity to proffer essential documents, the trial court has committed reversible error. These documents show perjured testimony in oral and written sworn statements concerning petitioner's seniority and pension rights."

The following is quoted from Appellant's Initial Brief (June 2, 1992), On Appeal from the Circuit Court of the Twelfth Judicial Circuit

in and for Sarasota County, Florida - On Appeal from a Non-Final Order, Summary of the Argument: "The lower court judge denied appellant a hearing in which conclusive and relevant evidence would have been proffered to prove, that January 14, 1969, not June 19, 1974 is appellant's correct service date. The lower court's action harmed the appellant, and benefited appellee, GTE Florida. That GTE Florida did not act in good faith by changing the accredited service date of a long-term employee, thereby denying her full pension benefits. That the lower court and the arbitrator both accepted, as true, GTE Florida's sworn statements in this regard - even though objected to at the time. That the years of service denied by the Company all predate ERISA protection (1974). That the appellant thought ERISA protection was available to her, and it was not. That there is no order in the lower court reassigning this case from Judge Parker to Judge Owens, and that efforts to recuse the

lower court judge failed, though a similiar conflict resulted in recusal of an appellate judge. The lower court acted locally and disregarded federal law and public policy in a ruling effectively denying accrued pension benefits negotiated through collective bargaining."

The issue of the arbitrator's affidavit in support of GTE Florida was raised on the appellate level in petitioner's motion for recall of mandate (October 23, 1992). This motion was changed to a motion for rehearing by the Second District Court of Appeal on November 9, 1992 and denied. Please see Appendix C. Quoting paragraphs 6, 7 and 9 from the motion: "The arbitration hearings were closed April 22, 1991, Arbitrator Vause submitted an affidavit on behalf of GTE Florida dated September 12, 1991. The affidavit was accepted by Circuit Court Judges Titus (recused) and Owens; Arbitrator Vause's affidavit stated plaintiff was discharged

for "good cause" - the collective bargaining standard is just cause. Arbitrator Vause's Opinion and Award, likewise, state just cause."

The Florida Supreme Court will not review appeals from non-final orders and petitioner's attempt at discretionary review by that Court failed November 24, 1992. Please see Appendix C.

REASONS FOR GRANTING THE WRIT

The Decision of the Second District Court of Appeal in this Case Expressly, Directly and Inherently Conflicts with the Decisions of the Supreme Court of the United States and Common Law.

"Due process of law clauses have the same meaning in both State and Federal Constitutions." Roundhouse Const. Corp. v. Telesco Masons Supplies Co. Inc., 429 U.S. 889 (1976). "State sovereignty is not absolute; state power can only be exercised against a person within confines of due process of law drawn by its procedural and substantive aspects." Aldens, Inc. v.

LaFollette, 434 U.S. 880 (1977).

Due process guarantees protect everyone from arbitrary and capricious court actions. These guarantees apply to any type of court order. Whether an order is final or non-final, "expressed" or not - if the effect or inherent effect is to deprive an individual of property, basic fairness, and an unbiased hearing the "official" name of the thing is superfluous. Florida Supreme Court Revisions (1980 - no common law right to certiorari, and no state supreme court review of appeals from non-final orders) cannot defeat Fourteenth Amendment rights under the United States Constitution, common law, and common sense.

"Pensions are a vested property right under the Fourteenth Amendment." Stuart v. Flynn, 380 F.Supp. 424 (1974). In Rodic v. Thistledown Racing Club, Inc., 449 U.S. 996 (1980), the Court held that: There is no independent right to due process; one is

entitled to due process only if the state deprives him of preexisting property or liberty."

The district court and the circuit court ignored perjured sworn statements by the respondent, GTE Florida, that had the effect of depriving the petitioner of five years of earned pension benefits (motion for relief from judgement - fraud). "Test of whether due process of law has been violated is whether the challenged practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Auxier v. Woodward State Hosp. School, 439 U.S. 930 (1978).

Petitioner's motions for relief from judgement were noticed for hearing by the circuit court judge. The circuit court judge later cancelled the scheduled hearing. In response petitioner filed the second of three mandamus petitions in this case (92-1457) in order to secure a due process

hearing concerning a protected property right. Subsequently, the Second District Court of Appeal changed petitioner's mandamus request to a motion to relinquish jurisdiction and consolidated it with petitioner's full appeal (92-1328).

Both respondent and petitioner had a right to be heard on this issue. "Notice and opportunity to be heard are the minimal requirements of due process." In re Riggs, 450 U.S. 921 (1980). "A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process." Carter v. Morehouse Parish School Board, 404 U.S. 880 (1971).

The district court, in violation of due process, arbitrarily changed petitioner's motion for recall of mandate to a motion for rehearing. This was the second time the district court had authorized rehearing on an unauthorized non-final order. The Second District Court of Appeal is in conflict with their own and all other State District Courts

of Appeal on the issue of rehearing non-final orders. Potucek v. Smeja, 419 So2d 1192 (Fla 2d DCA 1982). By doing this the district court was able to disallow the affidavit of Arbitrator William Gary Vause submitted on behalf of GTE Florida. The affidavit was submitted after the arbitration hearings were closed and in violation of federal law, common law, and the Code of Professional Responsibility for Arbitrator's of Labor-Management Disputes. In Bayne v. Morris, 68 U.S. (1 Wall) 97 (1863) the Court said: "Arbitrator's exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority confirmed on them is then at an end." Also see Henfree v. Bromley, 6 East 309, 102 Eng. Rep. 1305 (K.B. 1805). Petitioner maintains that this action on the part of the district court was partisan and biased, and states this because of the Second District Court of Appeal's many ties to Stetson College of

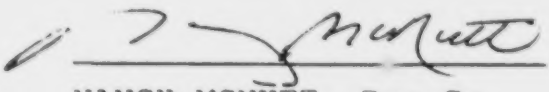
Law and the arbitrator's employment there.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

DATED: January 8, 1993

Respectfully Submitted,



NANCY MCNUTT, Pro Se

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

NANCY MCNUTT,

Appellant,

v. CASE NO. 92-02009

GTE FLORIDA INCORPORATED,

Appellee.

Opinion filed October 21, 1992.

Appeal from nonfinal order of the Circuit Court for Sarasota County; Andrew D. Owens, Jr., Judge.

Nancy McNutt, pro se.

James V. Carideo, Thomas R. Parker, Leslie R. Stein,

APPENDIX A

Lorin H. Albeck, Franklin H. Deak, Joseph W. Foster, Kimberly Caswell, Ernesto Mayor, Jr., and Eric Edginton, Tampa, for Appellee.

PER CURIAM.

Affirmed.

CAMPBELL, A.C.J., HALL AND PATTERSON, JJ., CONCUR.

APPENDIX A

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY, FLORIDA

NANCY McNUTT,

Plaintiff,

vs. CASE NO. 91-4513-CA-01

GTE FLORIDA, INC.,

Defendant.

_____/

FINAL ORDER CONFIRMING ARBITRATOR'S AWARD

THIS CAUSE having come before the Court on the Complaint and Application to Vacate Arbitrator's Award filed by the Plaintiff, Nancy McNutt, and the Court finding that the Plaintiff has failed to show evident partiality pursuant to Section 682.13(1)(b), Florida Statutes, and that the Plaintiff failed to show exclusion of material evidence pursuant to Section 682.13(1)(d), Florida Statutes, and the Court further

finding that the arbitrator's award entered May 21, 1991, by W. Gary Vause, Arbitrator, should be confirmed it is

ADJUDGED THAT the Complaint and Application to Vacate Arbitrator's Award is hereby denied. It is further

ADJUDGED THAT the arbitrator's award entered May 21, 1991, W. Gary Vause, Arbitrator, is hereby confirmed.

DONE AND ORDERED in Sarasota, Florida, this 3rd day of March, 1992.

_____

ANDREW D. OWENS, JR.

CIRCUIT JUDGE

APPENDIX A

IN THE CIRCUIT COURT OF THE TWELFTH JUCICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY, FLORIDA

NANCY MCNUTT,

Plaintiff,

vs. CASE NO. 91-4513

GTE FLORIDA, INC., CA-01

Defendant.

_____/

ORDER

This cause having come before the Court and the Court finding the Plaintiff, Nancy McNutt, filed a Notice of Appeal in this action April 6, 1992, it is

ADJUDGED THAT both of Plaintiff's Motions for Relief from Judgement are hereby denied as moot.

DONE AND ORDERED IN Sarasota, Florida, this 13th day of April, 1992.

_____

ANDREW D. OWENS, JR.

CIRCUIT JUDGE

APPENDIX B

cc:

Nancy McNutt, Pro Se

3030 Courtland Street

Sarasota, Fl 34237

Lorin H. Albeck, Esquire

GTE Florida, Inc.

P.O. Box 100, MC 7

Tampa, Fl 33601

APPENDIX B

IN THE SECOND DISTRICT COURT OF APPEAL,

LAKELAND, FLORIDA

NANCY McNUTT,

Appellant(s),

v.

GTE FLORIDA, INC.,

Appellee(s).

_____/

April 24, 1992

CASE NO. 92-01328

92-01457

BY ORDER OF THE COURT:

Upon consideration, it is ordered that the above-numbered cases are hereby consolidated.

It is further ordered that the petition for writ of mandamus filed in Case No. 92-01457 is treated as a motion to relinquish jurisdiction and is granted. Jurisdiction is relinquished to the circuit court for 45 days for petitioner to obtain a ruling on her motions for relief from judgement.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

APPENDIX B

C: Nancy McNutt

Lorin H. Albeck, Esq.

Honorable Andrew D. Owens, Jr.

Karen E. Rushing, Clerk

/BB

APPENDIX B

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY, FLORIDA

NANCY MCNUTT,

Plaintiff,

vs. CASE NO. 91-4513-CA-01

GTE FLORIDA, INC.,

Defendant.

_____/

ORDER

The Second District Court of Appeal having relinquished jurisdiction to the Circuit Court effective April 24, 1992. The Court having reviewed both Motions for Relief from Judgement filed by Plaintiff.

IT IS ADJUDGED that both of Plaintiff's Motions for Relief from Judgement are hereby denied.

DONE AND ORDERED in Sarasota, Florida, this 29th day of April, 1992.

_____

ANDREW D. OWENS, JR.

APPENDIX B

CIRCUIT JUDGE

cc: Ms. Nancy McNutt
3030 Courtland Street
Sarasota, FL 34237

Lorin H. Albeck, Esquire
GTE Florida, Inc.
P.O. Box 100, MC 7
Tampa, Fl 33601

William A. Haddad, Clerk (Case No. 92-01457)
Second District Court of Appeal
P.O. Box 327
Lakeland, FL 33802

APPENDIX B

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY, FLORIDA

NANCY MCNUTT,

Plaintiff,

vs. CASE NO. 91-4513-CA-01

GTE FLORIDA, INC.,

Defendant. (2ND DCA CASE # 92-1457)

_____/

ORDER

THIS CAUSE having come before the Court on the Motion for Rehearing and Clarification filed by the Petitioner/Appellant, Nancy McNutt, and the Court having reviewed same,

IT IS ADJUDGED that the Motion for Rehearing and Clarification is hereby denied.

DONE AND ORDERED in Sarasota, Florida, this 12th day of May, 1992.

APPENDIX B

ANDREW D. OWENS, JR.

CIRCUIT JUDGE

cc: Ms. Nancy McNutt

3030 Courtland Street

Sarasota, FL 34237

Lorin H. Albeck, Esquire

GTE Florida, Inc.

P.O. Box 100, MC 7

Tampa, FL 33601

APPENDIX B

IN THE SECOND DISTRICT COURT OF APPEAL

LAKELAND, FLORIDA

NOVEMBER 9, 1992

NANCY McNUTT,

Appellant(s),

v. Case No. 92-02009

GTE FLORIDA, INC.,

Appellee(s).

_____/

BY ORDER OF THE COURT:

Appellant, pro se, having filed a motion for recall of mandate which the court treated as a motion for rehearing in the above-styled case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

APPENDIX C

c: Ms. Nancy McNutt

Lorin H. Albeck, Esq.

Karen E. Rushing, Clerk

/PM

APPENDIX C

SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 24, 1992

NANCY MCNUTT,

Petitioner,

vs.

GTE FLORIDA INCORPORATED,

Respondent.

CASE NO. 80,805

District Court of Appeal 2nd District - No. 92-02009

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. William A. Haddad, Clerk

APPENDIX C

Hon. Karen E. Rushing,

Clerk

Hon. Andrew D. Owens,

Jr., Judge

Nancy McNutt, Sarasota

Lorin Albeck, Esquire

By: Betsy Hill

Deputy Clerk

APPENDIX C